The award for general damages for the period of 19 months should be reduced to a sum of $14,345 at the rate of $755 per mensem. To this sum must be added a sum of $3,500 for loss of expectation of life and a sum of $4,465 being special damages and from the total a deduction of 25% must be made to account of contributory negligence. The net result would be $16,732.50.

In the result the appeal will be allowed with costs. The so-called cross-appeal as indicated earlier is dismissed with costs. The amount awarded by the High Court as damages in the sum of $113,845 is hereby reduced to $16,732.50, being a sum of $13,383.75 in respect of general damages and a sum of $3,348.75 in respect of special damages.

Azmi C.J. (Malaya) and Pike C.J. (Borneo) concurred.

Appeal allowed.

Solicitors: *Joseph & Son; Laycock & Ong.*

SEOW KIM KOI v. WEI YIN CHEN

[O.C.J. (Choor Singh J.) August 27, 1968]
[Singapore — Suit No. 463 of 1967]

Landlord and Tenant — Controlled premises — Subletting — Agreement providing rent less than that actually paid by sub-tenant — Whether oral evidence could be introduced to show that agreement was a sham — Whether amount paid was standard rent of sub-let portion — Control of Rent Ordinance (Cap. 242), s. 3(4)

Evidence — Evidence to show terms of tenancy agreement were fictitious and a sham — Whether allowable — Evidence Ordinance (Cap. 3), ss. 92 and 93.

This was an action by the plaintiff to recover from the defendant the sum of $9,230 under section 3(4) of the Control of Rent Ordinance stated to be excess rent paid by the plaintiff to the defendant over a period of 71 months at the rate of $130 per month.

The defendant, a tailor was the chief tenant of No. 190 Orchard Road (hereinafter referred to as the premises). He paid a rent of "slightly more than $100 per month" to his landlords the Singapore Cold Storage Co. Ltd. Until November 4, 1960 the defendant carried on a tailoring business on the ground floor of the premises and resided with his family on the first floor of the premises. In October 1960 the defendant decided to sub-let the ground floor of the premises to the plaintiff at $230 per month but the agreement entered into between them and prepared by a solicitor stipulated the rental for the sub-let ground floor of the premises as $100 per month. It was in evidence that the plaintiff had been paying the defendant $230 per month since the commencement of the sub-letting.

Held: (1) the rental stipulated in the tenancy agreement namely $100 per mensem was a fictitious rent and was not intended to operate as the agreed rent but was inserted to create evidence for some other purpose namely to protect the defendant against eviction by his superior landlord the Singapore Cold Storage Co. Ltd.;

(2) section 93 of the Evidence Ordinance does not preclude a party from showing that the writing in question was not really the contract between the parties but was only a fictitious or colourable device to cloak something else. Oral evidence is admissible to show that what purports to be an agreement was only a sham and was not intended to be acted upon. On the authority of *Tygaraja Mudaliar's* (2) case the defendant was entitled to show by oral evidence that the rent of $100 per mensem stipulated in the tenancy agreement was not to be acted upon and he had successfully done so;

(3) as the ground floor of the premises was let for the first time at the rental of $220 per mensem, it was the standard rent of the premises and the defendant was entitled to receive the sum as lawful rent unless and until it was varied by the Rent Conciliation Board.

Cases referred to:—

(1) *Pertab Chunder Ghose* v. *Mohendra Purkait & Ors.* (1889), L.R. 16 I.A. 233, P.C.

(2) *Tygaraja Mudaliar* v. *Vedathanni* [1936] M.L.J. 79, P.C.

(3) *Pym* v. *Campbell* 6 E. & B. 370.

(4) *Mattayappan* v. *Palani Gaundan* (1913), I.L.R. 38 Mad. 226.

CIVIL SUIT.

N. A. Christopher for the plaintiff.

R. E. Redrup for the defendant.

Choor Singh J.: In this action the plaintiff sought to recover from the defendant under section 3(4) of the Control of Rent Ordinance (Cap. 242) the sum of $9,230 stated to be excess rent paid to the defendant over a period of 71 months at the rate of $130 per mensem.

The facts are these. The defendant who is a tailor by occupation is the chief tenant of premises known as No. 190 Orchard Road, Singapore, which belongs to the Singapore Cold Storage Co., Ltd. to whom he pays a rental of "slightly more than $100 per mensem." Until the 4th of November 1960 he carried on a tailoring business on the ground floor of the premises and resided with his family on the first floor of the premises. In October 1960 as business was bad and he had a large family to support he decided to sub-let the ground floor of the premises and to carry on his business on the first floor. He instructed his employee Loke Chee Hoong to find a sub-tenant for the ground floor. Loke introduced the defendant to the plaintiff who agreed with the defendant to take the ground fioor on a rental of $230 per mensem. The plaintiff and the defendant went to a solicitor's office where instructions were given for the drawing up of a tenancy agreement which is Exhibit A.B.1. The facts narrated so far are not in dispute. The dispute is as to what happened in the solicitor's office and strangely enough neither party has thought fit to call the solicitor Mr. P. Y. Tan, who drew up the tenancy agreement (Exhibit A.B.1) and witnessed its execution by the parties.

The plaintiff's version was as follows. The instructions to the solicitor were given in his presence. The solicitor asked the defendant what rent he was paying to his landlord, the

Singapore Cold Storage Co., Ltd. The defendant stated that he was paying "slightly more than $100 per mensem". The solicitor then informed the defendant that the maximum rent he could charge for the ground floor was $100 per mensem and that if he charged more than $100 per mensem the defendant's landlord, the Singapore Cold Storage Co., Ltd. could claim possession of the premises from the defendant. Other conditions of the agreement were also discussed and the agreement was then engrossed. Both parties signed the agreement in the presence of the the solicitor. After that both parties went to 190 Orchard Road where the defendant opened the ground floor of the premises. He tendered to the defendant $100 as rent. The defendant refused to accept this sum and said that unless he was paid $230 he would not give possession of the ground floor. The defendant's exact words were: "Unless you pay me $230 I will not move my things out and I will not allow you to come in to do business". He protested and pointed out to the defendant that the agreement was for $100 per mensem. The defendant replied, "No. If you don't pay me $230 I will not allow you to do business here". When the defendant said that, he gave him another $130. The defendant gave a receipt for $230. He had been paying the defendant $230 per mensem since that date.

The defendant's version was as follows. Before the parties went to the solicitor's office the rent of the ground floor had been agreed between them at $230 per mensem. The rent stipulated in the tenancy agreement drawn up by the solicitor was $100 per mensem because that figure was inserted for the purpose of showing it to his landlord, the Singapore Cold Storage Co., Ltd. In case that company attempted to evict him, the tenancy agreement would be produced to show that he was charging his sub-tenant a rental of $100 per mensem only, but as between him and the plaintiff the rent had been agreed at $230 and the plaintiff was to pay him $230 every month. After the signing of the agreement they went to 190 Orchard Road where the plaintiff paid him $230 as rent and he gave the plaintiff a rent receipt for $230. It was not true that the plaintiff tendered him $100 and that when he refused it the plaintiff handed another $130. The plaintiff tendered $230 in the first instance and he has been paying $230 per mensem as rent ever since.

It was put to the defendant by counsel for the plaintiff that when the solicitor told him that he could not charge more than $100 per mensem, he agreed to reduce the rent to $100 per mensem and that was why the rent stipulated in the agreement was $100 per mensem but the defendant denied this.

I accepted the defendant's version. The defendant was at the material time in financial difficulties. His business was bad and he had a large family to support. The whole purpose of his sub-letting the ground floor was to obtain some extra income. Furthermore, if it was true that the defendant insisted on receiving $230 per mensem when in fact rent had been agreed at $100 per mensem, the plaintiff need not have taken up the sub-tenancy of the ground floor. The rent was demanded and paid before the plaintiff occupied the ground floor. The plaintiff admits he paid $230 before going into occupation and it is evidenced by the receipt issued by the defendant (Exhibit A.B.5). The tenancy agreement and this receipt bear the same date, 4th November 1960 and that is the date on which the plaintiff occupied the ground floor.

On the evidence before me I found it as a fact that the rent stipulated in the tenancy agreement, namely, $100 per mensem was a fictitious rent and was not intended to operate as the agreed rent but was inserted to create evidence for some other purpose, namely, to protect the defendant against eviction by his superior landlord, the Singapore Cold Storage Co., Ltd.

Counsel for the plaintiff submitted that the defendant was bound by the terms of the written tenancy agreement; that he was precluded by section 93 of the Evidence Ordinance from giving oral evidence to vary its terms; that the rent of $100 per mensem stipulated in the tenancy agreement was the agreed rent and that the defendant could not be heard to say that the agreed rent was in fact $230 per mensem.

On the facts of this case and the law applicable thereto, I was unable to accept the submission of counsel for the plaintiff. Section 93 of the Evidence Ordinance does not preclude a party from showing that the writing in question was not really the contract between the parties but was only a fictitious or colourable device to cloak something else. Oral evidence is admissible to show that what purports to be an agreement was only a sham and was not intended to be acted upon. As far back as 1889 it has been held by the Privy Council in *Pertab Chunder Ghose* v. *Mohendra Purkait & Ors.*[1] that if a defendant is told that any stipulation in an agreement would not be enforced, he could not be held to have assented to it. Consequently the document was not the real agreement between the parties, and the plaintiff could not sue upon it. Sir Richard Couch, in delivering the judgment of the Privy Council, observed, at page 237:—

> "Further, if there is any stipulation in the Kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the Kabuliyat is not the real agreement between the parties, and the plaintiff cannot sue upon it."

Pertab Chunder Ghose's case was considered and followed by the Privy Council in *Tygaraja Mudaliar* v. *Vedathanni* [2] where their Lordships

examined sections 91 and 92 of the Indian Evidence Act, 1872, which are substantially the same as sections 92 and 93 respectively of our Evidence Ordinance. In that case a Hindu widow, shortly after the death of her husband, signed a document evidencing the undivided status of her husband and his brother and making certain provisions for her maintenance. Having received nothing for maintenance, she brought an action for arrears and alleged that she was induced to sign the document on the verbal assurance by the brother that the document was only intended to create evidence of the undivided status of the family and that the provision therein for her maintenance, which she considered inadequate, was not to be the final contract, and that her claim for maintenance on a more suitable scale was to be left over for future settlement. The question before their Lordships was whether, under the provisions of section 91 and 92 of the Indian Evidence Act,, oral evidence was inadmissible to establish that it had been agreed that the provision for the plaintiff's maintenance was not to be acted on, as the document was only intended to create evidence of some other matter. It was held that there is nothing in either section 91 or section 92 of the Indian Evidence Act, 1872, to exclude oral evidence to establish that there was an agreement that the provision in the document for the widow's maintenance was not to be acted upon; that on the oral evidence there was an agreement that the provision in the deed as to maintenance should not be acted upon and there was, therefore, no contract as to maintenance and further that the widow, having been told that the stipulation as to maintenance in the document would not be enforced, could not be held to have assented to it, and there was not, therefore, in the document a real agreement between the parties as to maintenance. Sir John Wallis, who delivered the judgment of the Privy Council, explained the provisions of sections 91 and 92 of the Indian Evidence Act, 1872, as follows:—

"When a contract has been reduced to the form of a document, section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself, unless otherwise expressly provided in the Act, and section 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on section 91, which only excludes oral evidence as to the *terms* of a written contract. Clearly, under that section, a defendant sued, as in the present case, upon a written contract purporting to be signed by him, could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement that, as in *Pym* v. *Campbell*,[3] the signed document was not to operate as an agreement until a specified condition was fulfilled, or that as in the present case, the document was never intended to operate as an agreement, but was brought into existence solely for the purpose of creating, evidence of some other matter, stands exactly on the same footing as evidence that the defendant's signature was forged."

xx xx xx

The Indian Legislature has thought well to give statutory effect to the decision in *Pym* v. *Campbell* in proviso 3 to section 92:—

> 'the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract . . . . may be proved';

and in *Mattayappan* v. *Palani Goundan* [4] Benson and Sundara Ayyar JJ. have expressed the opinion that oral evidence to show that a document was never intended to operate according to its terms, but was brought into existence, as in the present case, solely for the purpose of creating evidence about some other matter is admissible under proviso 1 to section 92:—

> 'any fact may be proved which would invalidate any document.'

This may well be so but in their Lordships' opinion, even if there was no provisos to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract.

It was also contended that the case came within section 92, because of the provision recognising the widow's title to the jewels in her possession. The High Court have found that this provision was not intended to operate as an agreement, but was introduced to give verisimilitude to the document, it being usual to make such a provision in agreements for a widow's maintenance. Further, it was held by this Board in the passage already cited from the judgment in *Pertab Chunder Ghose* v. *Mohendra Purkait* that if the defendants were told that any stipulation in the agreement would not be enforced, they could not be held to have assented to it. Consequently the document was not the real agreement between the parties, and the plaintiff could not sue upon it.

In their Lordships' opinion both the lower courts were right in finding on the oral evidence in this case that there was no contract, and they will humbly advise His Majesty that the appeal be dismissed with costs."

Reverting to the facts of the present case, I had no doubt at all that the rent of $100 per mensem stipulated in the tenancy agreement was not to be acted upon and the evidence showed that it has never been acted upon. Immediately after the signing of the tenancy agreement, the plaintiff paid the defendant the agreed rent of $230. The defendant never agreed to a rent of $100 per mensem and he is for that reason not bound by what is stated in the tenancy agreement because that figure of $100 was inserted for another purpose. The plaintiff knew this and also knew that he had to pay $230 per mensem which in fact he had been doing for so many years. On the authority of *Tygaraja Mudaliar's* case the defendant was entitled to show by oral evidence that the rent of $100 per mensem stipulated in the tenancy agreement was not to be acted upon and in my opinion he had successfully done so.

As the ground floor of the premises was let for the first time at a rental of $230 per mensem, the standard rent of the ground floor was therefore $230 per mensem, and the defendant is entitled to receive that sum as lawful rent unless and until it is varied by the Rent Conciliation Board. Accordingly the plaintiff has not paid the defendant any sum "in excess of the rent which may lawfully be received" in respect of the ground floor of the premises and his claim was therefore dismissed with costs.

Claim dismissed.

Solicitors: *N. A. Christopher; R. E. Redrup.*

CHUNG KHIAW BANK LTD. v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and McIntyre F.J.) August 29, 1968]

[Kota Bharu — Federal Court Criminal Reference No. X.1 of 1968]

Road Traffic — Forfeiture of motor vehicle — Whether mandatory — Whether legal owner of vehicle has right to be heard before order of forfeiture is made — Road Traffic Ordinance, 1958, s. 92.

This was a reference under section 66(1) and 66 (6)(b) of the Courts of Judicature Act, 1964 by the High Court for determination of the following questions:—

(1) Whether forfeiture of a motor vehicle seized under section 92 of the Road Traffic Ordinance, 1958, is mandatory under section 92(4) thereof if it is proved to the satisfaction of the court that an offence against section 92(1) thereof has been committed and that the vehicle was the subject matter of the offence?

(2) Whether the true legal owner of the vehicle regardless of the answer to (1) has a right to be heard before any order of forfeiture of the vehicle may be made?

Held: (1) the court has a discretion under section 92(4) of the Road Traffic Ordinance, to forfeit the vehicle or to order its release;

(2) the court should hold an inquiry under section 407(ii) of the Criminal Procedure Code (Cap. 6) and at such such inquiry the true legal owner of the vehicle has a right to be heard.

Cases referred to:—

(1) *Gun Kim Luu* v. *Public Prosecutor* [1961] M.L.J. 35.

(2) *Mohamed Salleh* v. *Public Prosecutor* [1962] M.L.J. 6.

(3) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.

(4) *R.* v. *Ng Hee Weng & Ors.* [1956] M.L.J. 85.

(5) *Public Prosecutor* v. *Lim Hock Seng* [1962] M.L.J. 398.

(6) *Public Prosecutor* v. *Chuah Khay Soon* [1967] 2 M.L.J. 110.

(7) *Allen* v. *Thorn Electrical Industries Ltd.* [1967] 3 W.L.R. 858, 867, C.A.

(8) *R.* v. *Ang Eng Keat* [1953] M.L.J. 1.

(9) *How Hee Kiat* v. *The Collector of Land Revenue* (1913), 1 F.M.S.L.R. 105 at 110.

(10) *Public Prosecutor* v. *Ong Keng Seong* [1967] 1 M.L.J. 40.

(11) *Kiaw Aik Hang Co. Ltd.* v. *Public Prosecutor* [1962] M.L.J. 276.

(12) *Sing Hoe Motor Co. Ltd.* v. *Public Prosecutor* [1968] 2 M.L.J. 54.

(13) *Sajan Singh* v. *Sadara Ali* [1960] M.L.J. 52.

FEDERAL COURT.

A. Wilson for the appellant.

Dato' Wan Ismail bin Wan Mohamed Salleh (Deputy Public Prosecutor) for the appellant.

Cur. Adv. Vult.

MacIntyre F.J. (delivering the decision of the Federal Court): This is a reference under section 66(1) and 66(6)(b) of the Courts Judicature Act, 1964, by Wan Suleiman J., in Kota Bahru, High Court Criminal Miscellaneous Application No. 11 of 1967, for determination by this court of the following questions, namely:—

(1) Whether forfeiture of a motor vehicle seized under section 92 of the Road Traffic Ordinance No. 49 of 1958 is mandatory under section 92(4) thereof if it is proved to the satisfaction of the court that an offence against section 92(1) thereof has been committed and that the vehicle was the subject matter of the offence?

(2) Whether the true legal owner of the vehicle regardless of the answer to (1) has a right to be heard before any order of forfeiture of the vehicle may be made?

Section 92 of the Road Traffic Ordinance reads as follows:—

"(1) Subject to the provisions of this Part of this Ordinance no person shall use a motor vehicle, or cause or permit a motor vehicle to be used, as a public service vehicle unless there is in force, in respect of such vehicle, a valid licence granted under this Part of this Ordinance authorising such use, or otherwise than in accordance with such licence and any conditions attached thereto; and if he does so, he shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand five hundred dollars or to both such imprisonment and fine:

Provided that a person shall not be convicted of an offence against this section if he proves to the satisfaction of the court that he used the motor vehicle, the subject of the charge, as a taxi cab or hire car in an emergency for the purpose of conveying a sick or injured person to hospital or to bring medical aid to such person or for the purpose of making a police report to a police station and that he had made all reasonable efforts to hire a taxi cab or hire car for the purpose of the journey.

(2) Any motor vehicle in respect of which there has been, or there is reasonable cause to suspect that there has been committed any offence against this section may be seized by any road transport officer or any police officer not below the rank of inspector in any place.